

6.0 Legal and Regulatory Issues Relative to Acquisition

Among the choices available to the City are actions that could lead to public ownership of the water utilities in one of several forms. This section includes descriptions of some New Hampshire laws. This discussion was prepared by persons with background in New Hampshire local governmental structures and operations but who are not attorneys.

THIS REPORT IS NOT A LEGAL BRIEFING AND SHOULD NOT BE RELIED UPON FOR LEGAL PURPOSES WITHOUT CONSULTATION WITH AN ATTORNEY.

6.1 Introduction

New Hampshire municipalities own and operate water supply and distribution systems. The purpose of this section is to evaluate whether one or more municipalities, a regional water authority or a village district have the authority to acquire an existing public water system and to identify the general requirements for such an action. This section is intended to provide only a general overview of these issues. Any interested party should consult an attorney familiar with these issues prior to taking any action related to the acquisition of a public water system.

More specifically, the following issues are addressed:

1. Whether a publicly owned, regional water authority or village district has the authority to acquire a public water system both within and beyond its corporate limits.
2. What the procedures are for a publicly owned, regional water authority or village district to acquire a public water system.
3. Whether a publicly owned or regional water authority that acquires a public water system becomes a public utility subject to regulation of rates and services by the N.H. Public Utilities Commission.
4. The regulations that apply to the operation of a public water system by a publicly owned utility.

A New Hampshire municipality, or two or more municipalities acting jointly, could acquire a public water system by following the procedures set forth in RSA 38. New Hampshire law does not expressly provide for an independent authority for providing public water supply. However, one or more municipalities could jointly acquire and/or operate a public water

system through an inter-municipal agreement under RSA 53-A or through the formation of a village district under RSA 52.

There are distinct advantages and disadvantages to each of these alternatives.

6.2 Acquisition of a Public Water System by One or More Municipalities

6.2.1 Municipal Powers

Under RSA 38, a municipality has the authority to acquire an existing public water system located within its boundaries. This includes the power to take an existing public water system,³ purchase or take any property for the purpose of water supply,⁴ construct water lines in any highway or other place,⁵ to do “all other things necessary for carrying into effect the purposes of [a water supply system].”⁶ A municipality may also take land “lying without the municipality which the public interest may require, pursuant to RSA 38:11 as determined by the [Public Utilities Commission].”⁷

The procedures to acquire a publicly owned water supply facility are discussed in Section 6.3.

6.2.2 Regional Water Authority

An authority for the purposes of this report is a special purpose political subdivision formed for the purpose of performing a specific and often narrowly defined function. Authorities are found in many states but are not common in New Hampshire. In order to function effectively, an authority needs to be able to raise money independently of other political subdivisions, to borrow money secured by specific income streams, to enter into long term contracts, to buy, sell and own property, to enforce its rules and regulations, and, in certain cases, exercise powers of eminent domain. Other powers may be required in specific cases.

Some New Hampshire solid waste compacts have some of the characteristics of authorities. The Winnepesaukee River Basin Control, which collects and treats wastewater for a group of communities between

³RSA 38:2, I.

⁴RSA 38:2, II; RSA 38:15.

⁵RSA 38:2, IV.

⁶RSA 38:2, III.

⁷RSA 38:6. See also RSA 38:14.

Meredith and Franklin, has some of the characteristics of an authority although the N.H. Department of Environmental Services owns it.

New Hampshire law does not expressly provide for a regional authority for public water supply. However, RSA 53-A allows two or more municipalities to enter into an inter-municipal agreement to own and operate a single public water system.

6.2.3 Inter-Municipal Agreements

An inter-municipal agreement is a contract between municipalities to jointly exercise their municipal powers such as the provision of water, sewer, solid waste or other services. Inter-municipal agreements are governed by RSA 53-A, which provides that any powers possessed by a municipality may be exercised jointly with any other municipality.⁸ For example, two or more municipalities could therefore form a single municipal corporation to provide public water provided that each municipality complied with the provisions of RSA 38 and RSA 53-A.

The terms of an inter-municipal agreement can be tailored to meet the goals of each municipality. However, each inter-municipal agreement must include certain provisions required by RSA 53-A, including the following:

1. The duration of the agreement.
2. The precise legal entity to be created by the agreement.
3. The purpose of the agreement.
4. The manner of financing and establishing and maintaining a budget for the joint or cooperative undertakings in the agreement.
5. The methods for terminating and disposing of property upon termination of the agreement.

All inter-municipal agreements must be submitted to the Attorney General and the state officer or agency having jurisdiction over any activities regulated by the agreement for review and approval prior to its becoming an enforceable legal document.

In the context of a public water system involving several municipalities, some alternative ways in which RSA 53-A could be used include:

1. An agreement in which several municipalities purchase all or part of a public water system, each responsible to finance its share of the costs of the system. Such an agreement would need to address

⁸RSA 53-A:3.

each municipality's obligations for jointly financing, expanding and operating the public water system.

2. An agreement in which one municipality acts as an agent for the purchase of a public water system on behalf of several municipalities. Such an agreement would need to address how the adjoining communities would reimburse the cost of the system, as well as each municipality's obligations for expanding and operating the public water system.
3. A single municipality purchases the entire public water system and enters into an operating agreement to operate the system on behalf of several municipalities. The purchase cost would be recovered through rates.

6.2.4 Village District

RSA 52 provides for the establishment of village districts for the supply of water for domestic and fire purposes. Village districts are created by the selectmen upon "petition of 10 or more legal voters, inhabitants of any village situated in one or more towns. . ."⁹ The selectmen then fix the limits of the proposed district and "call a meeting of the legal voters residing in the district to see if they will vote to establish the district, and if so to chose necessary officers therefore."¹⁰

Village districts have the power of eminent domain to acquire "any land or easement in land required for its purposes" by following the same procedures used in taking land for highways located in one town or two adjoining towns.¹¹

6.3 Procedure To Acquire a Public Water System

The procedure to acquire an existing water system and related property is set forth in RSA 38. One or more municipalities, or a village district may use this procedure.¹²

1. The municipality must first obtain a 2/3 vote of approval of the municipal governing body (city council) which must then be "confirmed by a majority of the qualified voters at a regular election or a special meeting duly warned in either case."¹³

⁹RSA 52:1.

¹⁰RSA 52:2.

¹¹RSA 52:18.

¹²Village districts may also acquire property by following the procedures established by RSA 52.

¹³RSA 38:2.

2. The municipality must notify the utility in writing within 30 days of the confirming vote by the qualified voters.¹⁴ The notice should identify the property that the municipality intends to acquire.
3. The utility must reply within 60 days of receipt of the written notice from the municipality. The utility may either respond in the negative, in which case it forfeits “any right it may have had to require the purchase of its plant and property by the municipality, and the municipality may proceed to acquire the plant as provided by RSA 38:10.”¹⁵ If the utility responds affirmatively, it must provide the municipality with the price and terms it is willing to accept and a schedule for all of the plant and property identified by the municipality.
4. The municipality and utility may negotiate and agree upon the price to be paid. These negotiations are not binding on the municipality until ratified by the qualified voters.¹⁶
5. If the municipality and the utility fail to agree upon the price, terms, and the extent of the property to be acquired by the municipality, either the municipality or the utility may petition the Public Utilities Commission to determine the price, terms, and extent of property to be acquired by the municipality.¹⁷
6. Within 90 days of the decision of the Public Utilities Commission, the municipality shall decide whether or not to acquire the plan and property at such price by a vote to issue bonds and notes pursuant to RSA 33-B. The vote may take place at a special meeting without having to petition to the Superior Court to do so.¹⁸

A specific timeline for an RSA 38 water utility acquisition is dependent on the decision making process of the community and the laws and ordinances governing the initial election and authorizing issuance of bonds. Figure 6-1 is a flow chart of the actions that are defined by RSA 38.

¹⁴RSA 38:6.

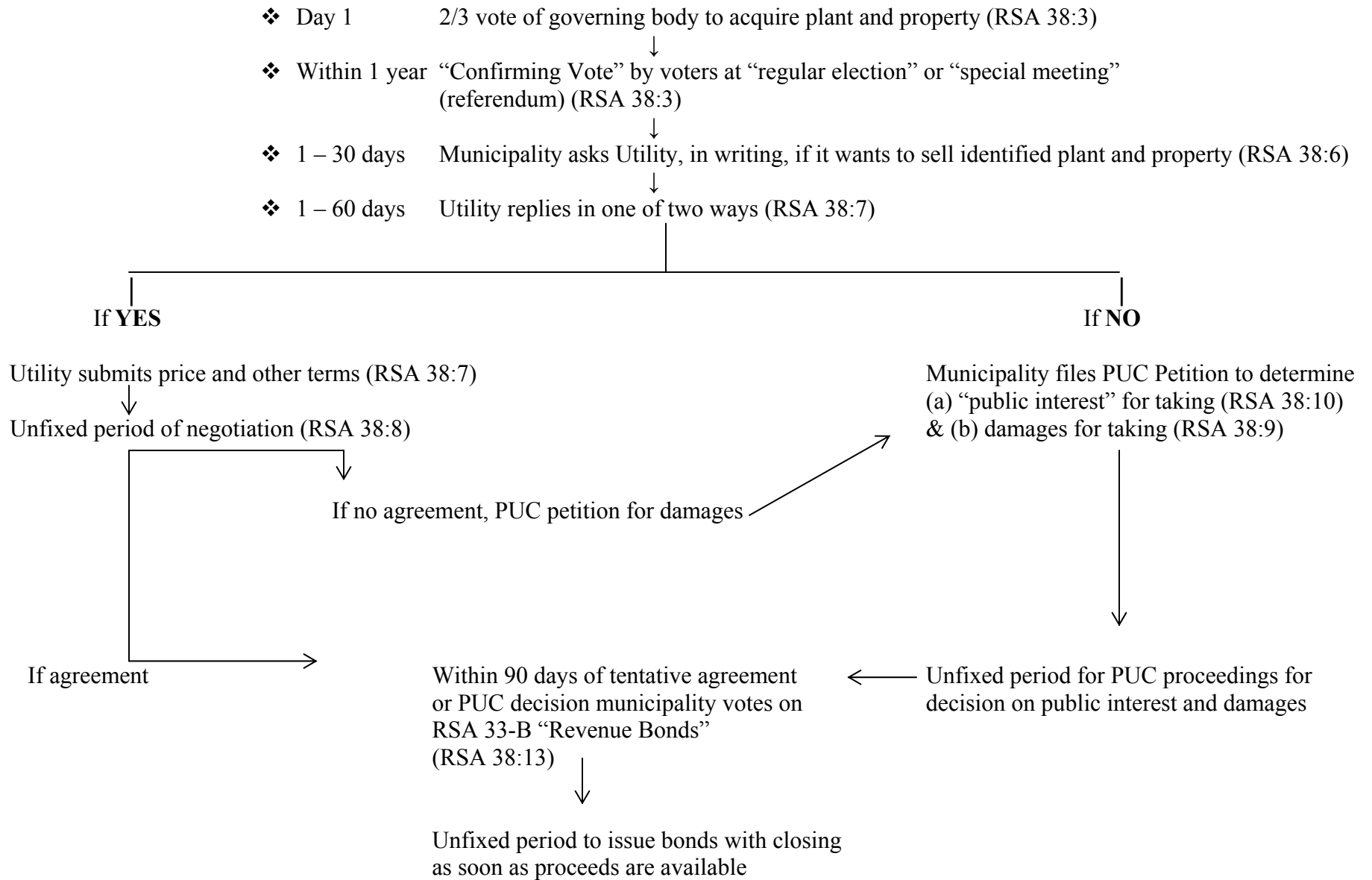
¹⁵RSA 38:7.

¹⁶RSA 38:8.

¹⁷RSA 38:9.

¹⁸RSA 38:13.

Figure 6-1
Steps for Acquisition per RSA 38



6.4 Publicly Owned Regulation With RSA 362

RSA 362 governs the regulation of a publicly owned water system by the Public Utilities Commission. However, a municipal public water system is not subject to regulation by the Commission provided that the municipality charges its customers outside the municipality a rate no higher than 15 percent above that charged to its municipal customers. See RSA 362:4, III.

6.5 Regulations Applicable To a Publicly Owned Water System

All public water systems, including municipal systems, are regulated under the Federal Safe Drinking Water Act, 42 U.S.C. 300f, and New Hampshire's Safe Drinking Water Act, RSA 485. The State of New Hampshire, Department of Environmental Services (DES), acts as a designated agent on behalf of the United States Environmental Protection Agency to monitor and enforce both the Federal and State Safe Drinking Water programs. RSA 485 is intended to establish standards at least as stringent as the Federal act.

RSA 485 defines a public water system as a system for the provision to the public of piped water for human consumption, if such a system has at least 15 service connections or regularly serves an average of at least 25 individuals daily at least 60 days out of the year. The definition includes the entire system for collection, distribution and storage.

DES regulates public water systems through a comprehensive set of regulations under RSA 485. These regulations include minimum standards for drinking water, monitoring requirements for compliance with each of these standards, review of the design and construction of public water systems, a certified operator and other requirements. New Hampshire regulations are typical of those throughout the United States and complete review of them is not needed for this report.

6.6 Discussion Of Alternatives

Based on our experience and the review above, we offer the following observations.

Approaches to Acquisition. There are three approaches available to New Hampshire cities and towns for the acquisition of a public water system: (1) a single municipal buyer; (2) several municipal buyers acting

cooperatively through an RSA 53-A inter-municipal agreement; or (3) establishment of a village district.

Current Ability to Form Authority. New Hampshire does not have laws that would allow political subdivisions to establish and operate a regional water system across several municipalities. Each of the alternatives we identified has both advantages and disadvantages.

Role of the N.H. Public Utilities Commission. In a contested acquisition using RSA 38, the case may come to the PUC for a determination, among other things, of the boundaries of the utility to be acquired. The PUC's determination of what is in the public good may be very different than any of the parties.

Single Municipal Purchaser. A single municipal purchaser would have to deal with the issue of the scope of its purchase, that is, how far beyond the boundaries of the municipality would it feel appropriate to maintain a water system. The main issue is the extent to which the municipality would want to take responsibility for distant communities and the extent to which residents of other communities would believe their interests were being preserved.

Inter-municipal Agreement Issues. For a variety of reasons, municipalities have not found RSA 53-A a useful tool for large, long-lived projects and programs. A typical application of RSA 53-A is a mutual aid agreement between police and fire departments of neighboring communities.

While the procedure for forming an RSA 53-A entity looks straightforward, the reality is that this type of agreement can be difficult to implement. The agreement would require complex coordination of the financing and acquisition of the system. Bonds or other debt instruments would have to be approved separately in each community. Agreements would need to be reached on the operation, management, rates and other aspects of the system prior to its acquisition.

An RSA 53-A agreement could be used to establish a framework for Inter-municipal cooperation on issues that did not require bonding authority such as maintenance and expansion of the system in adjacent communities, terms of service, ratemaking principles and other coordination issues.

Village District. While the statute does not specifically say so, we believe the intention of the village district laws is to provide services to a compact area that is a sub-region of a town or neighboring towns. It is not clear whether the voters of the district can delegate bonding authority to a representative body.

Regional Authority Enabling Legislation. Establishment of a regional water utility authority will require additions to New Hampshire laws to give authorities the powers discussed above. Even with the well thought out enabling legislation, formation of a regional water authority will require a great deal of negotiating and coordination to be successful.